In the Supreme Court of the United States.

OCTOBER TERM, 1921.

ALBERT B. FALL, *Secretary of the Interior*, Plaintiff in Error,
v.
UNITED STATES *ex rel.* WILLIAM T. MOSIER *et al.*
No. 205.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR.

This case involves a petition for writ of mandamus requiring the plaintiff in error to pay to the defendants in error certain moneys belonging to their minor children, who are members of the Osage Tribe of Indians. An answer was filed (Record, p. 8). To this defendants in error, hereinafter called relators, filed a replication traversing some of the matters of defense set up in the answer (Record, p. 15). A stipulation as to the facts was subsequently filed (Record, p. 19) and the case thus made was argued. The trial court, after having disposed of the issues in an opinion found on pages 20 *et seq.* of the record, entered a judgment allowing the writ. The Court of Appeals of the District of Columbia affirmed this

judgment, the majority of the court adopting the opinion of the trial judge (Record, p. 27). The Chief Justice, however, dissented, and his opinion is found on pages 31 to 33 of the record. A writ of error brings the case to this court.

THE FACTS.

By act of Congress approved June 28, 1906 (34 Stat., 544), a division of the Osage Indian lands, then held by the tribe in common, was directed. A final roll was made, and there were found to be 2,229 members—men, women, and children—who were to be what we may denominate "shareholders." The relators are among these shareholders. They are the parents of four minor shareholders—numbers 1569, 1570, 1571, and 1572 on final rolls. This action involves the payment of money due these four minor shareholders.

Section 2 of the act divided the lands among the shareholders. With the exception of certain reservations, the lands theretofore held in common were individualized by allotment; but by the seventh paragraph of the section, oil, gas, coal, and other mineral deposits were excepted from the operation of that section and were not to become the property of the individual owners of the land in which they might be found until the expiration of 25 years unless otherwise provided by Congress. Congress has since extended the period of ownership in common to April 7, 1946 (Act of March 3, 1921, 41 Stat., 1249). By section 3, these mineral deposits were

reserved to the tribe and mining privileges were to be leased by the tribe through its council, with the approval of the Secretary of the Interior, under rules and regulations prescribed by him, and at "royalties" to be paid to the tribe at rates to be determined by the President of the United States.

The Osage Indians are, therefore, interested in two classes of property: (*a*) The land, divided into 2229 parts, each part belonging to a member and held in severalty; (*b*) the mineral contents still reserved and held by the tribe as common property.

The Indians also had funds in the United States Treasury. Section 4 provided as to what should be done with these funds and certain other prospective sources of income. All said funds "and all moneys due and all moneys that may become due or may hereafter be found to be due" were to be held in trust for 25 years from January 1, 1907. These funds were to be segregated and placed to the credit of each shareholder, said credit to draw interest. This interest was to be paid quarterly to each shareholder—

> except in the case of minors, in which case the interest shall be paid quarterly to the parents until said minor arrives at the age of 21 years; *Provided*, That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest: *And provided further*, That said interest of minors whose parents are deceased shall be paid to their legal guardians as above provided.

All royalties received from oil, gas, or other mineral leases and all money received from the sale of town lots and of three certain reservations, as well as all money received from grazing lands, were to be placed in the Treasury to the credit of the shareholders for distribution to each "in the manner and at the same time" that the aforesaid payments of interest were to be made, i. e., quarterly.

Section 5 provided that at the expiration of 25 years the lands, mineral interest, and moneys should become the absolute property of the shareholders or their heirs and that deeds should issue and the principal fund distributed.

Section 6 provided that the lands, moneys, and mineral interests of the shareholder should descend to the legal heirs according to the laws of Oklahoma except where the shareholder leaves no issue, or husband, or wife; in which event the land, moneys and mineral interests go to the mother and father equally.

Section 7 directed that the lands set aside and severally allotted should be for the use and benefit of the individual allottee with a right to lease the same for farming or other purposes; but "that parents of minor members of the tribe shall have the control and use of said minors' lands, together with the proceeds of the same, until said minors arrive at their majority."

Section 12 provided that "all things necessary to carry into effect the provisions of this act not otherwise specifically provided for shall be done under

the authority and direction of the Secretary of the Interior."

When this act was passed the right to explore, drill and produce oil in the Osage lands was vested in the "Foster lessees" under a contract made by the tribe and Edwin B. Foster in 1896. The term of this lease expired in 1906, but it was renewed for another period of 10 years by act of March 3, 1905 (33 Stat., 1061). Royalties on production from such lands as were covered by the Foster leases were then in existence.

When the Foster leases expired in 1916 a new scheme went into operation. The privilege of obtaining oil and gas leases on tracts of land was auctioned off to the highest bidder, i. e., to the party bidding the highest sum of money to become the lessee of a particular tract. This sum of money is called the "bonus." The bonus system was known in the oil world prior to 1906 but was not in existence in the Osage country at the time of the passage of the act of June 28, 1906. So, while the act of 1906 makes specific provision for the division and distribution of royalties, the statute is silent as to bonus money for the very excellent reason that it was then neither in existence nor in contemplation. Yet it is a very substantial part now of the Osage income. More than $50,000,000 have accrued from this source since 1916.

Royalties have materially increased since 1906. The record (p. 9) shows that the *per capita* income of

the Osages from all sources was $168 in 1904, $343 in 1905, $256 in 1906, $388 in 1907, and $272 in 1908. The interest on the principal fund, which the act of 1906 directed should be divided and distributed, has amounted to $191 per annum. This indicates as the income of the six Osage shareholders that make up the Mosier family a total income of $1,008 in 1904, $2,058 in 1905, and $1,536 in 1906, the year when the act was passed. But in the year ending June 30, 1919 (Record, pp. 9 and 10), the income *from royalty alone* had advanced to $2,105 per capita per annum. This, with the interest, made $2,296 *per capita*. In the year ending June 30, 1920, the amount of royalty had increased to $3,360, presenting, with the interest, an income of $3,551. per capita.

Now, in the same year there was collected $4,730 for each shareholder from bonus money. At the time when this case was under consideration by the court below the total income of the Mosier family, if bonus be distributable as royalty, amounted to $49,686 in contrast with the $1,536 they were receiving at the date of the passage of the act.

The record shows, and it is not disputed, that the Osages with signal exceptions are indolent, extravagant, careless, and improvident. They have not been obliged to work or to earn their support. Despite their most unusual income, they have become involved in financial difficulties. They have spent all that they have received and have incurred indebtedness in sums that are startling and inexplicable. It is conceded that Mr. and Mrs. Mosier are not im-

provident squanderers, so far as we know. They represent an exception to the rule; but this is a test case, and what is decided here affects not them alone but the others.

This action grows out of two efforts of the Secretary of the Interior to save waste and to inculcate thrift. When the total per capita income was small, there was little chance for squandering, but after 1916, when the oil property was opened up to far greater exploitation than it ever knew under the Foster leases, a very difficult situation was presented. As to the adults, the Secretary had no choice under the act. He was directed to pay to each individual quarterly his share of the interest money and of the royalties. He could squander it as he pleased. The Secretary was also directed to pay over to the parents of minor shareholders their shares. As the attitude of parents in respect to minors' moneys was that the same in substance became their property upon payment, to be spent by them as they pleased in their own business affairs and in the support of the family in general as well as in the care and education of the minor children themselves (Record, p. 20), the Secretary, by order of April 30, 1917 (Record, p. 5, 10), directed that the parents of minor shareholders should make a statement showing what use had been made of the child's money received by them at the previous quarterly payment; and this with a view of finding facts on which it might be determined whether there had been any misuse or

in the Treasury as principal to yield an interest income (23 Decisions, Comp. Treas. 483, 486). The Comptroller thought that bonus should be classed with royalty. The Secretary, however, could not agree that bonus is royalty. Under the Comptroller's decision, he could not deposit the money in the United States Treasury. The best he could do was to divide and distribute it among the shareholders. This was simple so far as competent adults were concerned or where he could pay to legal guardians; but a difficulty immediately arose as to the minor's share. He had no authority to pay a minor's share to his parent as natural guardian unless bonus is the same thing as royalty.

Construing the act which it was his duty to administer and being unable to convince himself that bonus is royalty, he directed that parents who desired to receive the minor's share of bonus should take out special letters of guardianship so that he could pay to them in a capacity whereby they would be accountable under the law to a court. This worked very well until January 28, 1919, when the Supreme Court of Oklahoma in *Williams* v. *Hewitt* (181 Pac., 286), decided that there was no authority of law for the appointment of a parent as guardian of an Osage minor child where a parent was living unless under conditions specified in the act of April 18, 1912 (37 Stat., 86), viz, where the estate of the minor was being wasted or misused by the parents. Mosier took out letters of guardianship over his four children and as such received all their bonus money down to

and including the October, 1918, payment (Record, p. 12). The next bonus payment was in April, 1919 (Record, p. 12). At the time of the institution of the suit, Mr. Mosier could not receive this money as guardian under the decision in *Williams* v. *Hewitt;* nor could he receive it as natural guardian unless the term royalty in the statute comprehends bonus money; and that is one of the questions involved in this litigation.

THE QUESTIONS INVOLVED.

There are two main questions of law which this record presents:

(1) Is money derived from the sale of oil and gas mining rights in the Osage lands, known as "bonus" money, comprehended in the term "royalty" as used in the act of June 28, 1906 (34 Stat., 544), and is it to be treated and distributed as such?

(2) Is the minor child's income from trust funds and his distributable share of tribal income payable by the terms of said act to the parents during minority, the child's money or the parent's money, to be accounted for by the parent or not to be accounted for?

Incidental to the latter is a question of the Secretary's power to make regulations requiring an accounting.

The trial court resolved the first question in favor of relators' contentions, holding that "bonus" money is comprehended in the term "royalty" as used in the act and that it must be treated and distributed as

such. The two Associate Justices of the Court of Appeals adopted this view. The Chief Justice, however, holds that there is a wide difference between royalty and bonus and that there is no statutory direction to the Secretary to pay the child's share of the bonus to the parents.

The trial justice also determined the second question in favor of relators, holding that the parents of minors should have the use of the minors' money. He ruled that the money might be used in the upkeep of the family but that it must not be squandered. He further held that, in order for the Commissioner to inform himself as to whether the limitations of the proviso relating to payment of minors' moneys are observed by parents "*as its boundaries have been marked out herein*," it is not an unreasonable exaction to require parents to furnish him periodically with full statements of the expenditure by them of the moneys of their minor children; notwithstanding which, however, he entered up a judgment allowing the writ of mandamus to compel the Secretary to make to relators the quarterly payment due in June, 1919, without having received any such statement or showing from the relators as to their stewardship of the funds received by them on March 19, 1919. The relators may have conserved the March, 1919, payment; on the other hand, they may have gone back to their former practice of using it for their own purposes. The trial court makes no distinction between "misuse" and "squander." Two Justices of the Court of Appeals, by adopting his opinion, adopt

his view. The Chief Justice, in his dissenting opinion, recognizes the distinction between "misuse" and "squander," holding that if a minor's money is used for the benefit of anyone other than the minor it is misused.

ASSIGNMENT OF ERRORS.

The text of our assignment of errors is found on pages 35, 36 of the Record. They may be restated in three propositions:

1. That the court erred in taking jurisdiction to review the Secretary of the Interior in his judgment as to the proper construction of the act of June 28, 1906, a statute which it was his duty to administer, and to require the substitution of the court's construction for his own.

2. That the court erred in holding that bonus money is royalty within the meaning of said act.

3. That the court erred in holding that the money or income from the share of Osage minor children payable under said act to the parent during the minority of the child is in effect the money or property of the parent, to be used by the parent as his own in the up-keep of the family or in his own business; and in failing to hold that said money is the minor's money, any use thereof for the benefit of others being a misuse of the money within the meaning of the proviso to section 4 of said act.

ARGUMENT.

I.

The court erred in taking jurisdiction to review the Secretary in his construction of the act of June 28, 1906, a statute which it was his duty to administer, and through the writ of mandamus to require the substitution of the court's construction for his own.

A material change in the situation developed when the Osage shareholders' incomes became large as compared with the income existing in 1906 and when, through the expiration of the Foster leases, the entire oil-bearing territory was re-leased under a new system which created what we call the bonus money. The Secretary sought the language of the statute for guidance in the discharge of his duty. He could not find the word "bonus" or any other language that placed such funds in the category of those which he was bound periodically to disburse. He could not agree with the Comptroller's view. The authority of a text writer, Mr. Archer, later to be quoted, was more persuasive in his judgment. He was unable by construction to conclude that bonus is the same thing as royalty.

Being advised that parents were spending the entire large incomes of their minor children exactly as if it were their own, he also considered the language of the statute with the view of ascertaining if anything therein authorized him to stop this spoliation of what he deemed to be the minor's property. In his judgment there was justifying language. He saw a difference between *misuse* and *squander* and he

found that the statute employed both terms in describing a condition that would warrant the Commissioner in withholding further payments to parents of minors. He found in section 12 of the act authority to do all things necessary to carry into effect the provisions of the act. He thereupon made these regulations hateful to the relators and to those who had been wont to regard their child's money as their own. There was no plain direction to mark the way of clear ministerial duty. It was only through construction of the statute which it was his duty to administer that he could ascertain the lines of his duty. This involved discretion. Involving discretion we submit on the authority of this court's decision in *United States ex rel. Alaska Smokeless Coal Co.* v. *Lane* (250 U. S., 549, 555), that the Secretary's action is impregnable to mandamus even though his conclusion on the points of law involved may be disputable.

That his construction is not arbitrary, we think the argument which follows will develop. At least we shall submit the case with confidence that the relators' contentions are not so obviously and certainly right as to make it plainly the duty of the Secretary to give effect to them. If this be so, the relators are not entitled to a writ of mandamus such as the court below awarded. *United States ex rel. Hall* v. *Payne* (254 U. S., 343, 348). The decision of the majority of the Court of Appeals is a plain instance of a court's putting itself in the place of the Secretary, passing upon the same propositions, and

arriving at conclusions differing from his; and then through its extraordinary process, the writ of mandamus, compelling the Secretary to retract his decision and to give effect to another not his own and not having his approval. Was it the right of the courts below thus to review the Secretary? As this court said in *United States ex rel. Ness* v. *Fisher* (223 U. S., 683): "The question is not new, but has been often considered by this court and uniformly answered in the negative."

II.

"Bonus" money is not "royalty" within the meaning of the act.

Congress directed particularly the character of funds that must be disbursed every three months, as they accumulated, to the Osage shareholders. The statute announced five sources of individual income so to be distributed:

1. Interest on funds held in trust.
2. Royalties on mineral leases.
3. Money from town lot sales.
4. Money from sale of reservations.
5. Money from grazing.

It is on our contention that the Secretary need not disburse a single penny unless he can identify it with some one of the class of funds or sources of income just enumerated. There is no legislative direction to pay out "bonus" unless it is to be identified with "royalty." It manifestly can not be interest on funds, or money from sales of town lots or reservations, or money from grazing.

At the outset of the opinion of the court below, the court shows a signal lack of comprehension of the source of bonus money. It is spoken of as "money derived from the successful bidder for an oil lease of land *belonging to the minor children of the relators*" (Record, p. 28). Later they refer to the provision in section 7 that parents shall have the use and control of minors' lands "together with the *proceeds* of the same." On this foundation, they build the argument that "bonus" money is one of the proceeds of the minors' land. Royalty is also such a proceed. The thought seems to be that as both are proceeds both must be paid. This might be true if Congress had directed the quarterly payment of the *proceeds* from oil and gas mining leases; but Congress did not. It spoke of one of the proceeds only, viz, royalty. We can not follow the line of reasoning that leads to the conclusion that bonus must be royalty.

In the first place, this money is not derived from the sale of an oil lease *on land belonging to the minor children*. There may not be a drop of oil in the land allotted to them; and each shareholder, by the way, received an allotment under the act of something like 657 acres of land. The allotted land is the individual's own. The mineral deposits, however, bear no relation to the individual allotments. As already noted the oil and gas contents, regardless of their situs, whether under the surface of land allotted to this or that shareholder, were reserved to the tribe *in common*; and "bonus" as well as "royalty" is

proceeds from the common property; not from any individual holding allotment.

Congress commanded the Secretary to pay out royalty. Royalty had a well-defined meaning in 1906 and it has today. It embraces just one peculiar source of revenue from mining leases. It comprehends, as such, no more. Under the act, the Secretary has laid on him unquestionably a ministerial duty of paying out royalty—a duty which mandamus may enforce if not voluntarily performed. But that writ is not designed to enforce an undefined duty or even a questionable duty. It is not a proceeding to ascertain and define or create the right or a duty, but to enforce the performance of an existing clear ministerial duty (26 Cyc. 165). It is not competent, we submit, for a court to change the language of an act of Congress in order to discover a duty not otherwise clear. In this case the court below read into the act a broad term, "proceeds," which is not there, and erased the technical term "royalty," which is there. Royalty, of course, is one of the proceeds but only one of the proceeds of an oil lease. There is "rent for nondevelopment." Proceeds may include all these items but royalty is only an item. And, strictly speaking, bonus is not a proceed of a lease; on the contrary, the lease proceeds from the payment of bonus.

To understand the nature of the two, we must resort to the history of oil and gas mining. There are no court decisions distinguishing bonus and royalty.

Oil and gas are fugacious in nature. They are mobile minerals as distinguished from the solid minerals found in placer deposits or in rock in place. The latter are fixed *in situ*. The owner of the surface has title to the mineral content. The minerals are in his possession as a part of the *corpus* of his real estate. Oil and gas, however, while underlying the surface of his property, may escape from his land. So property in oil has been assimilated to property in animals *ferae naturae*—as merely a right to reduce to possession. The proprietor of the surface may bore into the earth to obtain oil or gas. No one else, without his permission, may do that. If he finds oil and reduces it to possession, the oil is his to remove and to sell. The exclusive right to bore, seek, and secure the oil and gas underlying his own land is one property right. But ownership in the subjacent oil is not his until his effort has resulted in dominion and control by actual possession. *Ohio Oil Co.* v. *Indiana* (177 U. S., 190, 208). That is another property right. The two things are essentially separate. (*Id.*, p. 202.)

But the owner may not do the drilling. Although he is full lord over his estate, with the exclusive right to drill, he may not desire to drill and secure title to the oil. He may, if he will, grant a part of his sovereignty to another party. He may invest an oil man with his right to drill and reduce the oil to possession. He may grant so much of his lordship as will enable the oil man to stand in his shoes in the matter of exploration and reduction of the oil to

possession. This is commonly done by what is called a "lease." Some say that it is not, strictly speaking, a lease but that it is in the nature of a grant of an incorporeal hereditament. It is immaterial so far as the case at bar is concerned.

The Osage Nation, as the owner of the oil and gas contents, divides the surface of land where these deposits are suspected to exist, and offers for sale to the highest bidder the right to drill, discover, and produce oil and gas on a certain tract. Several tracts are offered at public auction from time to time. The highest bidder on a given tract obtains there and then the right to have a lease executed to him. The consideration which he pays for this is called "bonus." He pays it whether or not oil or gas exists. He has to pay it before he has a right to drill, explore, and extract. He must pay it whether he finds a million barrels or a single drop. *It is the consideration for the grant of a partial estate in the land.* It is not the price for the oil he may take. When he pays it, or secures it, he is given the lease. Under the lease, when he exercises his right to drill and has found oil or gas, he becomes the owner thereof; but the lease provides in that event for another consideration; i. e., he must yield to the lessor, the Osage Nation, a certain percentage of the oil which he extracts and produces. *This is the royalty.* Section 3 of the act of 1906 provides:

> That the royalties to be paid to the Osage Tribe under any mineral lease so made shall be determined by the President of the United States.

The President has fixed the royalties at one-sixth or, in certain contingencies, one-fifth (Record, p. 12). The act does not speak of different kinds of royalties. In one place it says that the President is to fix the rate of royalties and elsewhere it identifies these royalties and says that the Secretary is to pay them out on a *per capita* basis at the time he distributes interest on the tribal trust funds. The court below says (Record, p. 29) that bonus "may not be royalty in the strict sense of the word but it is certainly money derived from 'oil * * * leases upon the lands' to quote the language of the statute." What of it? The statute does not direct the Secretary to pay out "money" received from oil leases upon the land. It directs him to pay out *royalty* received from oil leases upon the land. Besides bonus is not money derived from oil leases. The lease, or the right to lease, is derived from the payment of bonus money. Royalty is a proportion of the oil itself although it may be settled for by conversion into money. The distinction is observed by Mr. Archer in his work on "Oil and Gas" where on page 44 he says:

> The consideration which the lessee pays for the lease must not be confounded with the consideration which the lessor is to receive for the oil and gas. The cash consideration, *bonus*, or whatever it may be called, paid or agreed to be paid by lessee for the lease, is a consideration for the exclusive privilege of entry for exploration. The rental or commutation money is the consideration which

> the lessor receives for permitting the lessee to further hold his exclusive right of entry for exploration. These payments, by whatever name they may be called, do not vest any title in or right to the oil or gas in place. As long as no developments are made resulting in the discovery of oil or gas by lessee, his lease remains a mere privilege to enter and search. When lessee discovers oil or gas in paying quantities, his right to produce then becomes a vested right. He is then, and for the first time, authorized and obligated to pay the consideration to lessor for the exclusive vested right to produce the oil and gas, the true consideration for such minerals being the *royalty* of oils, and cash rental for gas, as the case may be.

In *Brookshire Oil Co.* v. *Casmalia Oil Co.* (103 Pac. 927), the court speaking of the effect of a lease said "the title is inchoate and for the purpose of exploration only until oil is found. If oil is found, then the right to produce becomes a vested right." On the other hand in *Venture Oil Co.* v. *Fretts Oil Co.* (102 Pac. 451), the court said that the right to explore is not an inchoate right but a vested right and that what is inchoate is the right to produce oil and gas unless and until the oil and gas is produced. It is immaterial whether the right to explore is an inchoate right or a vested right. So far as these cases are useful in this one, the real point is that the right to explore is in an estate which is the subject of a grant distinct from the oil and gas deposits themselves and that it may be granted for a distinct consideration

that does not depend in the slightest manner upon the existence of oil or gas, or upon title to oil or gas, except in so far as the amount of the bonus consideration offered reflects the judgment or the hopes of the bidder.

As already noted, the Osage oil lands were under lease on a royalty basis at the time of the passage of the act of 1906. There was no such thing as bonus in the Osage country at that time. There was no occasion for Congress to legislate concerning bonus. Royalty on production was in existence and Congress did legislate with reference to that. If we are bound to look to the act for some expression that will comprehend the then unknown bonus, there is much room for the contention that bonus comes within the category of "moneys that may become due" mentioned in section 4 of the act. This was the view originally taken by the Secretary of the Interior; but on February 23, 1917, the Comptroller of the Treasury ruled (23 Comp. Dec., 483) that the shares of the minor Osage Indians, whose parents are living, in bonus moneys received from the sale of oil leases should be classed with royalties to be paid out and that they could not be deposited in the Treasury so as to bear interest.

This decision was effective enough to prevent the Secretary from adding these bonus moneys to the Osage principal fund because the Comptroller's decision on the point was final; but neither his reasons nor his conclusion were controlling on the Secretary as

fixing the latter's duty to pay the money out. Yet it left the Secretary with Hobson's choice. It might well be argued that the Secretary's conception of the nature of bonus should require him to treat it as principal and then to withhold payment of bonus even to an adult. But, in the dilemma wherein he was placed by the Comptroller, he undoubtedly felt justified in making the distribution because the money went where it must ultimately go and the adults or the legal guardians of other shareholders could discharge him of liability. Ultimately it was theirs and their receipt of it, even if premature, barred them from complaint. Not so, however, where, contrary to the usual rule, a parent as natural guardian is demanding money belonging to a minor child who has no legal guardian.

The Secretary can not pay to a natural guardian except when thereunto specifically authorized by Congress, in strict accordance with the terms of such authorization.

On our theory, the oil and gas being reserved as a tribal estate, the bonus represents a cash consideration for the granting of a partial estate in the oil and gas bearing lands to someone else. Bonus is paid once and for all as the supposed equivalent in cash for the estate that is granted. It is not income to any extent other than the purchase price realized from the sale of real estate is income. Bonus is fixed by the bidder. Royalty is continuous as long as oil is found. It fluctuates with production and with the

price of oil and it is appropriately payable to the shareholders at recurring intervals. Moreover, it is fixed by the President under section 3 of the act.

And, after all, are we bound to find that "bonus" falls within some classification foreseen by Congress and covered by the act? It is certain that in point of fact "bonus" was not thought of in the 1906 legislation either as a present fact or a future possibility. Coming unexpectedly into existence, and not being specifically provided for in the act, it may well be contended that *ex necessitate* it is one of those things to be disposed of "under the authority and direction of the Secretary of the Interior." If, however, "bonus" is "money that may become due" and is to be treated as a retained principal and should not be disbursed even to an adult, it was wrong for the trial court to award the writ. By an unhappy failure to retain the adults' share, the Secretary could not create the duty of paying the child's share to the parent. Two wrongs do not make a right.

Finally, we point to the act of March 3, 1921 (41 Stat., 1249), as a legislative recognition that bonus is not royalty and that its disbursement must be provided for independently of any provision regarding royalty; for section 4 of that act provides for payment, in the future, of "bonus received from the sale of leases" as well as for "royalties received."

III.

The minor's share of money distributable under the act of 1906 is the minor's money and is not the property of the parent.

In discussing the Indian appropriation bill for 1919, Mr. Tinker, an Osage Indian, was a witness before the United States subcommittee. He claimed that the minors' share of the income belonged to the parent. The chairman of the subcommittee said:

> In other words, you want the door wide open, so that the parent, whether a spendthrift or not, may squander this golden stream and turn the child loose when he is 21 years old. Do you want a situation like that?
>
> Mr. TINKER. If you put the law in that way, all right.
>
> The CHAIRMAN. Nowhere for a thousand years, where civilization has obtained, has anybody, parent or not parent, been permitted to spend the money of an infant without rendering an account to some court.
>
> Mr. TINKER. But we insist this is not the money of the infant; it is the money of the parent; it belongs to the parent.
>
> The CHAIRMAN. If it belongs to the parent, I have no more to say.

That is the situation here. If it belongs to the parent, we have no more to say. The courts below were right if the money due on account of a minor becomes the parent's money upon payment.

The practice which the relator seeks to justify by this suit is the use by the parents of the minors'

shares of income paid to them under the statute as their own—in their personal business affairs and in the support of the family in general—and not exclusively to be used for the care and education of the minor; any unexpended balance above what is necessary for the individual child as the property of that child, to be accounted for by them upon the attainment of the minor's majority.

The court below sustains the practice which the Secretary condemns. On page 23 of the record, the court says that the Secretary insists such money can be used only for the benefit of the minor exclusively and if not so used that it would be a misuse or squandering of the funds. The court then says:

> In the opinion of the court this is an unwarrantable interpretation. It is plain that the Congress intended that the parents of minors should have the use of this money, as they are to have the use of the minors' land and the proceeds of the same. A use, no doubt, that shall be wise and calculated to improve the standards of their lives, to insure the education and maintenance of their children, and to produce a home environment tending to make better and more contented citizens. * * *
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> The statute makes the parents, not the Commissioner or the respondent, the judges in the first instance of the judicious use of the moneys in question. They may be used in the upkeep of the family and on an increasing scale of comfort as an increasing income may justly warrant.

The Secretary's view of the meaning of the statute is that the Commissioner is to pay the money to parents as natural guardians under the same conditions, liabilities, and limitations that it would be paid to legal guardians. It is his position that the parent must use the money for the benefit of the child exclusively and without squandering it. If there be a surplus after the reasonable needs of proper support and education are met, that surplus must be conserved for an accounting at the end of his stewardship, precisely as if he were a legal guardian. Any use of the money for the benefit of anybody but the minor child, the Secretary contends, is a *misuse* of that money which, just as much as squandering, justifies the Commissioner in withholding further payments.

When the communal holdings of the tribe were broken up and individualized, there was no distinction drawn between young or old, minors or adults. Each enrolled member became a shareholder to the extent of a 2299th part of the principal and distributable funds. Each share was without qualification the property of the shareholder. The money in the Treasury was to be placed to the credit of the individual members "on the basis of a *per capita* division among the members of said tribe, as shown by the authorized roll of membership." Section 6 of the act provided for the descent of lands, moneys, and mineral interests of any deceased member. No distinction that goes to the nature of a property right was made between minor child or his parent. It is

true that by section 7, in speaking of the minor's individual allotment of land, it is provided:

> That parents of minor members of the tribe shall have the control and use of said minor's lands together with the proceeds of the same until said minors arrive at their majority.

The ownership of the land does not change but here is authority for the parent's use of the *land and its proceeds.* It presents the kind of language Congress uses when it means to enact the idea that the relators and the court below entertain upon the question now before this court. But Congress used no such language in providing for the distribution of a minor's interest money and royalty money. The first paragraph of section 7 of the act provides:

> And the interest that may accrue thereon (i. e., the trust funds) shall be paid quarterly to the members entitled thereto, except in the case of minors, in which case the interest *shall be paid* quarterly *to the parents* until said minor arrives at the age of twenty-one years: *Provided,* That if the Commissioner of Indian Affairs becomes satisfied that the said interest of any minor is being misused or squandered he may withhold the payment of such interest: *And provided further,* That said interest of minors whose parents are deceased shall be paid to their legal guardians, as above provided.

The next paragraph provides for the payment of royalty, etc., in the manner and at the same time that the interest money is paid. There is no language

here that authorizes the parent to *use* the minor's money as there is in section 7 which deals only with such proceeds as may come from the minor's 657 acres of allotted land, i. e., the receipts from crops or the rent it may produce. Section 4 simply provides authority for payment to the parents as *natural guardians* where, were it not for this provision, the Secretary would be obliged to require the taking out of letters of guardianship before he could disburse any portion of the income of a minor. But there is no transmutative magic in these words "shall be paid," for we find them in the second proviso, namely, that the interest of minors whose parents are deceased "shall be paid to their legal guardians."

If Congress meant that the parents should have the use and benefit of the minor's money to improve the standard of their lives and to produce home environment as well as for educating and maintaining the children, did Congress also mean that the legal guardian should use the funds for the upkeep of his family on an increasing scale of comfort as the increasing income might justly warrant, and for producing "home environment"? Yet, if the language "shall be paid" to the parents means all this, why should not the language "shall be paid to their legal guardians" mean the same? And why, if it be possible that the parents receive this money to all intents and purposes exactly as they receive their own individual shares, should Congress be at all concerned whether the money thus paid was misused or squandered, when, as to the parents' individual

shares, the act made no provision in that regard? Yet, section 4 distinctly says that if the Commissioner become satisfied that the interest of any minor is being misused or squandered, he may withhold the payment of such interest. Congress called it the *interest of the minor* even after it was paid to the parent. It had not become in the legislative mind the property or interest of the parent.

The trouble with the courts below is that they failed to observe a distinction in definition between the words "misused" and "squandered."

The court will observe that Congress used two words—"misused," "squandered." These words are not identical. The Standard Dictionary defines "misuse" as "to use or apply wrongly or improperly." "Misusage" means "erroneous or improper use; misapplication." Squander has quite a different meaning: "To spend wastefully or with foolish lavishment; waste profusely; dissipate"; "To waste money or some other valuable thing; spend fortune or substance lavishly and foolishly." The synonyms are: "Dissipate, expend lavish, scatter, spend, throw away, waste"; and the antonyms are: "Economy, hoard, hold, husband, lay by, lay up, preserve, reserve, save."

The relators receiving a minor child's money may use it lavishly on him personally, indulge him with unnecessary luxuries, waste it in foolish extravagances, or invest it in some reckless wildcat scheme. The terms "squander" comprehends just such uses. The result is that every penny is dissipated.

On the other hand Mr. Mosier might not do these things—and as a matter of fact he does not, so far as we know. But he may take the money just as if it were his own and put it into his business or expend every cent of it for the support of his family in general with merely a benefit to the particular minor that would be incidental to such a use of the money; and that was what he did prior to 1917. Now, the difference between the lower court's view and the Secretary's thought is that the court says if he squanders the money in the general manner outlined, the Commissioner may withhold payments; while the Secretary holds that if he does not squander it, but so uses the money in the way last indicated, i. e., for himself and for his family in general, even if it does result in an increasing scale of comfort, promoting a better home environment, he is guilty of a *misuse* of the money that likewise justifies the Commissioner in withholding further payments. The loss to the child through the dissipation of his estate is exactly the same in the one as in the other instance.

The argument below that undertook a justification of the court's view was that at the time of the passage of the act of 1906 payments of a minor child's annuity or income to the parent were treated by the parent precisely as a payment of his own share. In other words it was then something like this: A father receives so much on his account and so much on his wife's account and, in addition, the same per capita allowance for each one of the minor children dependent upon him. The trouble with this argument is

that it is founded on casual facts rather than principle. The small per capita income then rather eliminated the chance of misuse or squandering because every penny was needed for a reasonable support. There is a wide difference between a family income of $1,500 and $50,000. Moreover, the Osages were not then enrolled as individual shareholders. After 1906, the child was just as much a shareholder as his parent was. Before 1906 what was paid to the parent might be regarded as an allowance on account of the child. But after 1906, the amount paid was on account of one equally with the parent a shareholder in the fund.

There is certainly no verbal support in the statute for the proposition that the parents are to determine what is a judicious use of this money. The law makes the Commissioner the judge. It is for him to become satisfied whether the interest of the minor is being misused or squandered. To enable him to act intelligently the regulations which are questioned by the relator were made. The courts below uphold the Secretary's authority to exact an accounting. Yet the judgment of the court requires the Commissioner to disregard every element that enters into our conception of the meaning of the word "misused." We submit that the Chief Justice of the Court of Appeals is wholly correct when he says:

> Misused means not used for the proper purpose. It is the minor's money that is paid to the parents and if used for the benefit of anyone else it is misused.

We submit that the language of the act of April 18, 1912 (37 Stat., 86), sustains this view in providing in section 3 that no guardian shall be appointed for a minor whose parents are living "unless the estate of said minor is being wasted or misused by such parents." That act evidently regards the money as the property of the child. Furthermore, the act of March 3, 1921 (41 Stat., 1249), amounts to a legislative confirmation of the Secretary's position by providing in section 4 for the payment of but $500 quarterly out of the income of an Osage minor for his maintenance and education, the payment to be made "to the parents or natural guardians or legal guardians actually having minor members under 21 years of age personally in charge."

CONCLUSION.

We think we have shown that the difference between "royalty" and "bonus" is so fundamental that the latter can not be regarded as comprehended by the former. At least we have shown—and the argumentative quality of the decision of the lower court also shows—that the relators' construction of the act is not so plainly obvious and certainly right that there is no room for the construction advanced by the Secretary. This affords reason enough for withholding the writ of mandamus in so far as the bonus money is involved; but our case is stronger than that: For the court took a proceeding for mandamus as an opportunity to construe the act itself exactly as if it were a reviewing tribunal with man-

damus as the proper process for review of the Secretary; and this for the purpose of finding in the act a duty not otherwise plainly apparent. The court directs the Secretary to perform this duty thus discovered and defined even if he must disregard his own construction of the act.

So in regard to the minor's money: The Secretary must abandon his thought that Congress meant some thing when it used the word "misused." He may call for statements from the parents, say the courts below, but if these statements show the expenditure of every penny in the parent's business or in support of the family in general, he must sit still, watch the process, and continue to pay out until he catches the parent in some act of squandering according to the court's idea, such as engaging "in hazardous or speculative undertakings or in lavish and extravagant expenditure" (Record, p. 23); and even then, we suppose, the question will arise as to whether the lavish and extravagant expenditures were not properly used in producing home environment tending to make better and more contented citizens. With the increasing income there is to be "an increasing scale of comfort." Who is to draw the line, and where? The court says the parents in the first instance are the judges; in the last instance, it may be a court; never, apparently, the Commissioner or the Secretary, because mandamus may be resorted to then to measure the "scale of comfort" and to determine whether suspected lavishment and extravagance were not after all necessary